IN THE

Supreme Court of the United States

October Term, 1969

No. 153

DANIEL McMANN, Warden of Clinton Prison, Dannemora, New York, and HAROLD W. FOLLETTE, Warden of Green Haven Prison, Stormville, New York,

Petitioners,

against

WILBERT ROSS, WILLIE RICHARDSON, FOSTER DASH and McKINLEY WILLIAMS,

Respondents.

BRIEF OF DISTRICT ATTORNEY OF NEW YORK COUNTY, *AMICUS CURIAE*, IN SUPPORT OF PETITIONERS

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BRIEF OF DISTRICT ATTORNEY OF NEW YORK COUNTY, *AMICUS CURIAE*, IN SUPPORT OF PETITIONERS

Introduction—Interest of *Amicus*

Question Presented

ARGUMENT

Jackson v. _Denno_ should not be applied retroactively to defendants who pleaded guilty.

the reasoning of the Circuit court, every judgment entered upon a plea of guilty is subject to attack if subsequently there is a change in the constitutional law relating to criminal procedure or admissibility of evidence. In this instance, respondents were held to be entitled retroactively to a *Jackson* hearing, since none was available when they pleaded guilty. By the same token, defendants who pleaded guilty prior to *Bruton* v. *United States*, 391 U.S. 123 (1968), would be entitled to petition for an evidentiary hearing to determine whether their pleas were "substantially motivated" by an expectation that they would be tried jointly with other defendants whose confessions implicated them.

In so ruling, the Court of Appeals misconstrued the nature of the "waiver" that underlies an acceptable plea of guilty. The validity of a plea of guilty in cases disposed of prior to 1964 is totally unaffected by the absence of a deliberate, intentional "waiver" of a *Jackson* hearing. Indeed, the only *prerequisite* announced constitutional rights that must be knowingly and understandingly "waived" for the plea of guilty to be accepted are, at most, the rights recently enumerated by this Court in *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969).

> "Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. *Malloy* v. *Hogan*, 378 U.S. 1. Second, is the right to trial by jury. *Duncan* v. *Louisiana*, 391 U.S. 145. Third, is the right to confront one's accusers. *Pointer* v. *Texas*, 380 U.S. 400."

Moreover, defendants need not be shown to have knowingly waived every procedural right that *subsequent* judicial decisions have added. In effect, a plea of guilty relinquishes the benefit of subsequently announced procedural rights that, as here, do not affect the reliability of the plea of guilty—even if those rights are applied retroactively to cases where there was a trial. This is implicit in the bargain which is struck when a defendant foregoes his right to a trial, as in the instant cases, in return for the benefits of a lesser plea. As this court recently noted, "some defendants benefit from the new rule while others do not, solely because of the fortuities that determine the progress of their cases from initial investigation and arrest to final judgment. The resulting incongruities must be balanced against the impetus the technique [prospective decision making] provides for the implementation of long overdue reforms, which otherwise could not be practically effected." *Desist* v. *United States*, 394 U.S. 244, 248 (1969). One wonders whether this Court, which was closely divided in *Jackson*, could have contemplated that its novel decision would be construed to require evidentiary hearings as to the admissibility of evidence at trials where there never was a trial. In a criminal justice system which disposes of "about 90% of all charges of serious crime and of about

Conclusion

The judgments of the Court of Appeals should be reversed.

Respectfully submitted,

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